Guideline Sentencing Update

a publication of the Federal Judicial Center • available via Internet at http://www.fjc.gov • vol. 11, no. 4, Oct. 3, 2001

Apprendi Issues

Consecutive Sentences

Several circuits hold, under plain error review, that the total sentence for multiple counts may exceed the maximum authorized by *Apprendi* for any one count if the same sentence would result from imposing consecutive terms under USSG § 5G1.2. For example, a defendant in the Fourth Circuit was convicted on three counts. He was sentenced to concurrent terms of 292 months for a drug offense and 240 months for each of two money laundering counts. Because neither the indictment nor the jury verdict specified the amount of drugs involved, defendant's statutory maximum sentence on the drug count was 240 months. The appellate court held that the sentence did not violate *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

Defendant was convicted "of three crimes, exposing him to a total statutory maximum prison term of 60 years. In the case of multiple counts of conviction, the sentencing guidelines instruct that if the total punishment mandated by the guidelines exceeds the statutory maximum of the most serious offense of conviction, the district court must impose consecutive terms of imprisonment to the extent necessary to achieve the total punishment. *See* U.S.S.G. § 5G1.2(d). . . . Had the district court been aware when it sentenced Phifer that the maximum penalty for his drug trafficking conviction was 20 years, § 5G1.2(d) would have obligated it to achieve the guideline sentence of 292 months imprisonment by imposing a term of imprisonment of 240 months or less on each count of conviction and ordering those terms to be served consecutively to achieve the total punishment mandated by the guidelines." The court noted that "*Apprendi* does not foreclose this result" because *Apprendi* did not decide the issue of whether consecutive sentences could have led to the same sentence in that case.

U.S. v. Angle, 254 F.3d 514, 518–19 (4th Cir. 2001) (en banc). *See also U.S. v. Le*, 256 F.3d 1229, 1240 & n.11 (11th Cir. 2001) (affirming on direct appeal 262-month total sentence of 240 months on one count and consecutive 22-month sentence on second count, where each had twenty-year statutory maximum—"*Apprendi* does not apply when the sentences on two related offenses are allowed to run consecutively under the relevant law and the sentence on *each* offense does not exceed the prescribed statutory maximum for that particular offense").

Other circuits have reached the same result when review is for plain error. *See, e.g., U.S. v. Price*, No. 99-7078 (10th Cir. Sept. 11, 2001) (Murphy, J.) (affirmed: although imposition of concurrent life sentences under §841(b)(1)(A) was plain error, "[b]ecause § 5G1.2(d) is a mandatory provision, . . . [t]he district court would be required to impose twenty-year terms on Defendant's seven drug convictions and to run these sentences, as well as Defendant's sentences on the other convictions, consecutively, resulting in a total consecutive sentence of 208 years"); *U.S. v. Kentz*, 251 F.3d 835, 842 (9th Cir. 2001) (affirmed: any error in 160-month sentence was harmless for defendant convicted of twenty-one counts, each with five-year maximum, where § 5G1.2(d) would require consecutive sentences to achieve total punishment); *U.S. v. Sturgis*, 238 F.3d 956, 960–61 (8th Cir. 2001) (affirmed: although 262-month sentence on one count violated *Apprendi*, under § 5G1.2(d) "the district court could have capped Sturgis's 262-month sentence on the crack count at the maximum 240 months, and run 22 of the 60 months on the marijuana count consecutively, thereby achieving the 262-month sentence imposed by the Guidelines"); *U.S. v. Page*, 232 F.3d 536, 542 (6th Cir. 2000) (affirming despite *Apprendi* error "since, absent the error, their sentences would have been the same" because § 5G1.2(d) "would require that the sentence imposed on one or more of the substantive counts run consecutive to the sentence on the conspiracy count, to the extent necessary to produce a combined sentence equal to the total punishment" that was imposed).

The Second Circuit, in another case under plain error review, found that "[t]he district court's use of section 5G1.2(d) did not result in a sentence on any one count above the maximum available on that count" under *Apprendi*. However, it remanded defendant's effective life sentence under the Guidelines—a total of 240 years reached by making the sentences for the six counts of conviction consecutive—because the district court erroneously indicated it had no discretion to depart. "[N]otwithstanding the apparent mandatory nature of section 5G1.2, a sentencing court may depart from the 'stacking' provision of that section to impose concurrent sentences where the imposition of multiple stacked sentences based on similar conduct created 'an aggravating or mitigating circumstance . . . .' More broadly, we have suggested that a sentencing court may depart downward where findings as to uncharged relevant conduct made by the sentencing court based on a preponderance of the evidence substantially increase the defendant's sentence under the Sentencing Guidelines." The case was remanded for the district court to "consider whether, on the

particular facts of this case, a downward departure from the mandatory stacking provisions of section 5G1.2 or based on the substantial effect of the court's relevant conduct findings might be appropriate."

U.S. v. White, 240 F.3d 127, 132–37 (2d Cir. 2001).

See *Outline* generally at II.A.3.a and c, V.A.1

Retroactivity

Eighth and other circuits hold that *Apprendi* is not a "watershed rule" requiring retroactive application on collateral review. An Eighth Circuit defendant's appeal of the denial of his motion under 28 U.S.C. § 2255 was pending when *Apprendi* was decided. The government conceded that defendant's sentence would violate *Apprendi*, but argued that *Apprendi* set forth a new rule of constitutional law that, under *Teague v. Lane*, 489 U.S. 288 (1989), is inapplicable to cases on collateral review. The appellate court agreed that *Apprendi* did not fall within any of *Teague*'s exceptions to the general rule.

"Relevant to our inquiry is the exception permitting watershed rules, ones which 'implicate the fundamental fairness of the trial,' to be raised collaterally. . . . [W]e hold today that *Apprendi* is not of watershed magnitude and that *Teague* bars petitioners from raising *Apprendi* claims on collateral review." Although *Apprendi* "unmistakably altered the legal landscape and is easily categorized as a new rule, . . . we do not believe *Apprendi*'s rule recharacterizing certain facts as offense elements that were previously thought to be sentencing factors resides anywhere near that central core of fundamental rules that are absolutely necessary to insure a fair trial."

Exceptions have been allowed only for rules that "impart a fundamental procedural right that . . . is a necessary component of a fair trial," and that "not only improve accuracy, but also alter our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding." The court concluded that "[p]ermitting a judge-found fact to affect the sentence imposed after a valid conviction, even if it is found under a more lenient standard, cannot be said to have resulted in a fundamentally unfair criminal proceeding," and "*Apprendi* appears no more 'important' to a fair trial than rules previously addressed by the [Supreme] Court, including the rule announced in *Batson v. Kentucky*, 176 U.S. 79 (1986), which the Court refused to apply retroactively in *Teague*."

U.S. v. Moss, 252 F.3d 993, 997–1001 (8th Cir. 2001) (Richard S. Arnold, J., dissented). *Accord McCoy v. U.S.*, No. 00-16434 (11th Cir. Sept. 25, 2001) (Hull, J.) (affirmed: agreeing with *Moss* and others that "the new rule announced by the Supreme Court in *Apprendi* does not fall within either exception to *Teague*'s non-retroactivity standard"); *U.S. v. Sanders*, 247 F.3d 139, 147–51 (4th Cir. 2001) (affirmed: "a rule which merely shifts the fact-finding duties from an impartial judge to a jury clearly does not fall within the scope of the second *Teague* exception"). *See also Jones v. Smith*, 231 F.3d 1227, 1236–38 (9th Cir. 2000) (in § 2254 proceeding, finding that *Apprendi* rule does not fit within *Teague* exception "at least as applied to the omission of certain necessary elements from the state court information" where those elements were argued at trial and included in jury instructions).

A recent Supreme Court decision may end the need for lower courts to determine whether *Apprendi* set forth a "watershed rule." The Court examined the exception in § 2244(b)(2)(A) that allows a second or successive § 2254 petition based on a new rule of constitutional law that has been "made retroactive to cases on collateral review by the Supreme Court." It concluded that "'made' means 'held' for purposes of § 2244(b)" and thus "a new rule is not 'made retroactive to cases on collateral review' unless the Supreme Court holds it to be retroactive." The Court discussed *Teague* and the watershed rule, but indicated that, at most, *Teague* could be used only to determine whether "this Court *should* make [a prior case] retroactive to cases on collateral review." That does not help petitioner because his motion must be dismissed under § 2244 unless the Court had *already* made the new rule retroactive. *Tyler v. Cain*, 121 S. Ct. 2478, 2482–85 (2001).

Following *Tyler*, the Sixth Circuit determined it did not have to reach petitioner's watershed rule claim in denying a motion to file a second petition under § 2255, which has the same exception. The court reasoned that *Tyler* "stated that *Teague* is not controlling for collateral cases [under §§ 2254 and 2255]. . . . As the Supreme Court has not held that *Apprendi* applies retroactively to cases on collateral review, Clemmons's second petition fails to satisfy the requirements of 28 U.S.C. § 2255." *In re Clemmons*, 259 F.3d 489, 492–93 (6th Cir. 2001). *Accord Forbes v. U.S.*, 262 F.3d 143, 145–46 (2d Cir. 2001).

Offense Conduct

Drug Quantity

Two more circuits hold that drug amounts for personal use should not be counted in setting offense level for distribution offense. The Seventh and Ninth Circuits have held that drugs intended for personal consumption should not be included when sentencing for the offense of possession with intent to distribute. *See U.S. v. Wyss*, 147 F.3d 631, 632 (7th Cir. 1998); *U.S. v. Kipp*, 10 F.3d 1463, 1465–66 (9th Cir. 1993). Such amounts are counted, however, when defendant is convicted of conspiracy. See, for example, *U.S. v. Page*, 232 F.3d 536, 542 (affirmed: "drugs obtained by defendant from his supplier for his personal use were properly included by the district court in determining the quantity of drugs that the defendant knew were distributed by the conspiracy"), cases cited therein, and *Outline* at II.A.1.c, p. 39.

The Eighth Circuit recently found "*Wyss* and *Kipp* persuasive. For sentencing purposes, we note an important

distinction between a conviction for conspiracy to distribute and a conviction for possession with intent, or an attempt to possess with the intent to distribute. . . . When a defendant, who is a member of a conspiracy to distribute, purchases drugs for her personal use from a co-conspirator, the personal-use quantities 'are relevant in determining the quantity of drugs the defendant knew were distributed by the conspiracy.' . . . What the buyer intends to do with the drugs, in this situation, is irrelevant." However, for possession with intent to distribute, or an attempt to do so, "those drugs acquired for personal consumption are possessed without the intent to distribute, and they were not acquired from another person who was a party to a conspiracy to distribute. Keeping drugs for oneself is not within 'the common scheme or plan' of selling, giving, or passing them to another; therefore, personal-use quantities are not relevant conduct."

U.S. v. Fraser, 243 F.3d 473, 475–76 (8th Cir. 2001) (remanded for calculation of amounts that were for personal use and must be excluded) (Hansen, J., dissented).

The Second Circuit also agreed that "in sentencing defendants convicted of possession with intent to distribute, drugs meant only for personal use must be excluded from the drug quantity assessment. . . . Where . . . there is no conspiracy at issue, the act of setting aside narcotics for personal consumption is not only not a *part of* a scheme or plan to distribute these drugs, it is actually *exclusive* of any plan to distribute them." Because defendant was also subject to a mandatory sentence of twenty years under 21 U.S.C. § 841(b)(1)(A) if found to have possessed at least 50 grams of cocaine base (the government alleged he had 68.9 grams), the court added that "in calculating the quantity of drugs relevant for purposes of sentencing under 21 U.S.C. § 841, any fractional quantity of drugs intended for personal use must be excluded."

U.S. v. Williams, 247 F.3d 353, 357–59 (2d Cir. 2001) (remanded). *See also U.S. v. Asch*, 207 F.3d 1238, 1243–46 (10th Cir. 2000) (exclude drug amounts kept for personal consumption in setting penalty for conspiracy offense under § 841(b), including possible mandatory minimum); *U.S. v. Rodriguez-Sanchez*, 23 F.3d 1488, 1493–96 (9th Cir. 1994) (same, for possession with intent to distribute offense).

See *Outline* at II.A.1.c

Departures

Mitigating Circumstances

Eighth Circuit holds that departure is not warranted for interdistrict sentencing disparity based on one district's blanket refusal to enter into § 1B1.8 agreements. Under USSG § 1B1.8(a), a defendant and the government may enter into a cooperation agreement that allows defendant to provide information about the illegal activity of others, which could lead to a lower sentence, without having any self-incriminating information that is provided under the agreement used to increase the sentence. The district court found that there was a significant disparity between the Northern District of Iowa, which rarely used such agreements, and the Southern District, and that it had the authority to depart downward based on the disparate practices of the prosecutors. The court departed downward for a Northern District defendant who cooperated with the government and, as a result of information he provided, had his offense level increased from 28 to 36.

The appellate court reversed. Citing cases that have found "no authority to depart based on sentencing disparities that resulted from interdistrict differences in plea-bargaining policies," and the general proposition that "disparities in sentences among codefendants resulting from a routine exercise of prosecutorial discretion are unsuitable for departure," the court reasoned that "'justified' disparities—those resulting from the proper application of the Guidelines to each individual case—are not an appropriate basis for departure. . . . However, unjustified disparities may warrant a departure."

"Determining whether the interdistrict disparity in prosecutorial practices in these cases is justified turns upon prosecutorial authority. Only if the prosecutors do not possess the authority to rarely agree to section 1B1.8 protection would that practice result in an improper application of the Guidelines, resulting in an unjustified disparity that could be corrected through the departure power. . . . [A]fter separating the wheat from the chaff in this case, we are left with the following question: is a general policy or practice of rarely granting section 1B1.8 protection within the government's proper exercise of prosecutorial discretion?"

Examining § 1B1.8 and its commentary, which "contain no language that would limit the prosecutor's discretion concerning when or how often to enter into agreements to extend section 1B1.8 protection," and the similar discretion under § 5K1.1, the court concluded that "the most natural reading of section 1B1.8 is that the [Sentencing] Commission intended a decision about entering into agreements to be left to the prosecutor's discretion." Therefore, absent improper or unconstitutional conduct, "any disparities arising from appropriate prosecutorial practices (or sentences resulting from those practices) are justified under the Guidelines. . . . [D]isparities resulting from proper exercises of the discretion by prosecutors cannot be said to be 'unusual' or 'atypical' enough to warrant departure under section 5K2.0."

U.S. v. Buckendahl, 251 F.3d 753, 758–63 (8th Cir. 2001) (Heaney, J., dissented). See also summaries of *McMutuary* and *Banuelos-Rodriguez* in 11 *GSU* #1.

See *Outline* at VI.E

En banc Eighth Circuit reverses panel decision, holds that post-sentencing rehabilitation may not be used as basis for departure at § 3582(c)(2) resentencing. After defendant was sentenced to life on drug charges, the drug quantity tables were retroactively amended and, after her motion for resentencing under 18 U.S.C. § 3582(c)(2) was granted, led to a new guideline range of 324–405 months. The district court then granted her request for a departure based on her rehabilitation while in prison, and sentenced her to 144 months. A divided appellate panel affirmed the departure, reasoning that in other circumstances the court had previously allowed consideration of departures at § 3582(c)(2) resentencings on grounds not available at the original sentencing. *U.S. v. Hasan*, 205 F.3d 1072, 1074–75 (8th Cir. 2000).

The en banc court reversed. Under § 3582(c)(2), as implemented by USSG §1B1.10, a district court first determines what a defendant's sentencing range would have been had the amended guideline been in effect at the original sentencing. Then the court determines whether to reduce the sentence to that level based on "the facts before it at the time of the resentencing, in light of the factors set forth in 18 U.S.C. § 3553(a), to the extent they are applicable." In that second step, "the guiding factors in § 3553(a) and the applicable policy statements of the Sentencing Commission are not grounds for an additional departure below the new sentence length already determined by the district court in step one. . . . The statute does not say that the court may reduce the term of imprisonment below the amended sentencing range or that the § 3553(a) factors or the applicable policy statements should be considered for such an additional reduction."

"The only time a district court is authorized by § 1B1.10 to depart downward from the amended sentencing range at a § 3582(c) resentencing is when a downward departure previously had been granted at the original sentencing." *See* USSG § 1B1.10, comment. (n.3). "It goes without saying that Ms. Hasan did not and could not have received a downward departure at her original sentencing for *post-sentencing* in-prison good conduct. The departure granted by the district court to Ms. Hasan at her resentencing is not consistent with the applicable policy statement (§ 1B1.10) issued by the Sentencing Commission to govern § 3582(c)(2) resentencings, and therefore runs afoul of § 3582(c)(2) itself, which requires action 'consistent with applicable policy statements issued by the Sentencing Commission.'" The court also distinguished the cases relied upon by the previous panel.

U.S. v. Hasan, 245 F.3d 682, 684–90 (8th Cir. 2001) (en banc) (four judges dissented). *Cf. U.S. v. Maldonado*, 242 F.3d 1, 5 (1st Cir. 2001) (although amendment to Guidelines prospectively prohibited departures based on post-sentence rehabilitation, effective Nov. 1, 2000, this circuit had previously allowed such departures and, where original sentencing occurred before amendment, defendant could argue for departure after successful 28 U.S.C. § 2255 motion resulting in de novo resentencing).

See *Outline* at I.E.6, p. 29, and VI.C.2.a, p. 341

Guideline Sentencing Update, vol. 11, no. 4, Oct. 3, 2001

Federal Judicial Center
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, DC 20002-8003